

***United States Court of Appeals
for the
District of Columbia Circuit***



**REPLY
BRIEF**

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 84-1252, 84-1392, 85-1014

United States Court of Appeals
For The District of Columbia Circuit

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GEORGE A. FISHER
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ASSOCIATION OF ETHYLENE OXIDE USERS,

Petitioner

v.

ROBERT A. ROWLAND, ASSISTANT SECRETARY
OF LABOR FOR OCCUPATIONAL SAFETY AND
HEALTH, et al.,

Respondents

PUBLIC CITIZEN HEALTH RESEARCH GROUP, et al.,

Petitioners

v.

ROBERT A. ROWLAND, ASSISTANT SECRETARY
OF LABOR FOR OCCUPATIONAL SAFETY AND
HEALTH, et al.,

Respondents.

ON PETITIONS TO REVIEW THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATIONS'S STANDARD REGULATING
EMPLOYEE EXPOSURE TO ETHYLENE OXIDE

RESPONDENTS' BRIEF IN REPLY TO BRIEF OF
AMICI DINGELL, et al.

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TABLE OF CONTENTS

	<u>Page</u>
I. THE SUPERVISION EXERCISED BY THE PRESIDENT THROUGH EXECUTIVE ORDER 12291 DOES NOT CONSTITUTE A DISPLACEMENT OF THE SECRETARY OF LABOR'S DECISION MAKING AUTHORITY.....	4
II. THE PRESIDENT HAS AUTHORITY UNDER THE CONSTITUTION TO ISSUE EXECUTIVE ORDER 12291.....	11
III. THE PROVISIONS OF EXECUTIVE ORDER 12291 ARE CONSISTENT WITH THE OSH ACT.....	15
CONCLUSION.....	19

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
*American Federation of Government Employees v. Carmen, 669 F.2d 815, 823 (D.C. Cir. 1981).....	13
In Re Mining Regulation Litigation, 627 F.2d 1346, 1357 (D.C. Cir. 1980).....	6
*Kalaris v. Donovan, 679 F.2d 376 (D.C. Cir. 1983).....	14,16
Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838)...	12,13
Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451, 456 (D.C. Cir) cert denied, 382 U.S. 978 (1966).....	6
Meat Packers Ass's v. Butz, 526 F.2d 228 (8th Cir.)..... cert. denied, 424 U.S. 966 (1976).....	6
Myers v. United States, 272 U.S. 52 (1926).....	12
Nat'l Renderers Ass's v. E.P.A., 541 F.2d 1281, 1291-92 (8th Cir. 1976).....	6
*Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981)...	<u>passim</u>
United States v. Accardi, 347 U.S. 260 (1954).....	17
<u>Constitution, Statutes and Regulations:</u>	
Constitution, Art. II, §3; §2.....	10,18
31 U.S.C. 501.....	7
49 Fed. Reg. 36660.....	8
Executive Order 12291.....	<u>Passim</u>
<u>Miscellaneous:</u>	
Elliott, <u>INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto</u> , 1983 Supreme Court Review 125.....	12

Grundstein, <u>Presidential Power, Administration and Administrative Law</u> , 18 Geo. Wash. L. Rev. 285, 309-19 (1950).....	13
Neustadt, <u>Presidency and Legislation: The Growth Of Central Clearance</u> , XLVIII Amer. Pol. Science Review 641 (1954).....	8
Shane, <u>Presidential Regulatory Oversight and the Separation of Powers: The Legality of Executive Order no. 12291</u> 23 Ariz. L. Rev. 1235 (1981).....	12
Stewart and Sunstein, <u>Public Programs and Private Rights</u> , 95 Harv. L. Rev. 1193 (1982).....	11
*Straus, <u>The Place of Agencies in Government: Separation of Powers and the Fourth Branch</u> 84 Col. L. Rev.. 573 (1984)...	11

*/ Authorities chiefly relied upon are marked with an asterisk.

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RESPONDENTS' BRIEF IN REPLY TO BRIEF OF
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Amici's brief, filed in support of Petitioner Public
Citizen, is exclusively concerned with the Office of Management
and Budget's participation in the Secretary of Labor's

rulemaking pursuant to Executive Order 12291.¹ In its principal brief, the Government demonstrated that the President has authority -- both under the Constitution and the Occupational Safety and Health Act -- to issue EO 12291. In this Order, the President sets forth his regulatory principles and directs the heads of Executive Branch agencies to conform their rulemaking to these principles to the extent permitted by their enabling statutes. OMB is directed to review draft rules and economic analyses under the Order to insure that the President's principles are followed.

Amici, in response to the Government's brief, contend that

¹ Amici are five committee chairmen in the House of Representatives. Their brief is not filed on behalf of the House or their various committees; it is filed solely on behalf of themselves.

Amici represent that they have been political opponents of regulatory reform measures such as those contained in EO 12291. See Amici's Brief, pp. 4, 32. This is accurate. So far, their actions have apparently had the effect of precluding consideration by the whole House of such measures. For example, as their brief acknowledges, a bill was introduced in the 97th Congress -- S. 1080, entitled the Regulatory Reform Act of 1982 -- which would have largely codified the regulatory reform measures contained in EO 12291. Id.; see also, Cong. Rec. S2713 ff. (daily ed., Mar. 24, 1982). This bill was introduced in the Senate and jointly sponsored by seventy-three Senators. It passed the Senate by a vote of 94-0. Id. In the House, a companion bill was favorably reported by the House Judiciary Committee. H. Rep. 97-435, 97th Cong. 1st Sess. However, while the bill was before the House Rules Committee, Cong. Dingell and his fellow amici subjected the bill to what has been termed "a lethal dose of talking [which] . . . appeared to doom the bill for the 97th Congress." 1982 Cong. Quar. 3029 (Dec. 12, 1982). In any event, Congress adjourned before action by the Rules Committee. The House was thereby deprived of the opportunity of considering and voting upon a bill, the Senate version of which was overwhelmingly endorsed, and the legislation was defeated in the 97th Congress.

the President lacks both constitutional and statutory authority to so supervise the discretion granted to the Secretary of Labor. Amici contend that the decision-making power of the Secretary of Labor has been displaced and "shift[ed] . . . to OMB" contrary to the provisions of the OSH Act and without constitutional authorization.² Amici's Brief, p. 28. Amici's contentions require the following brief response.

² Amici, like Public Citizen, also contend that: (1) OMB's participation violates APA and OSH Act rulemaking provisions since OMB decision making processes are not made a part of the rulemaking record (Amici's Brief, pp. 35-42); and (2) OMB's participation led to a rule shaped by cost-benefit considerations not permitted by statute (Amici's Brief, pp. 43-48).

These contentions do not require extensive response. This Court has already decided that an agency's contacts with the President (or contacts with the President's staff) during the course of rulemaking need not be made part of the rulemaking record, even if "undisclosed Presidential prodding may direct an outcome that is . . . different from the outcome that would have obtained in the absence of Presidential involvement." Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981). Amici's arguments are foreclosed by Sierra Club, and they make no attempt to distinguish this case.

With regard to the "cost-benefit" issue, the Department of Labor has not, in any of the statements they have made -- provisional or final -- concerning the STEL, ever mentioned, let alone relied upon, cost-benefit considerations. Amici's suggestion, that "the decision to delete the STEL can only be explained on cost/benefit grounds" (Amici's Brief, p. 45, n. 19), does not take into consideration that the Secretary of Labor did premise his decision on grounds unrelated to cost-benefit considerations, i.e., that a dose-rate response to EtO would need to be established before a STEL would be justified.

Nor has OMB expressed the view that the Secretary of Labor's rules would be inconsistent with the President's Order if they were not based upon cost-benefit considerations; the Order only requires an agency to take cost-benefit issues into consideration "to the extent permitted by law." EO 12291, §2.

THE SUPERVISION EXERCISED BY THE PRESIDENT THROUGH
EXECUTIVE ORDER 12291 DOES NOT CONSTITUTE A DISPLACEMENT
OF THE SECRETARY OF LABOR'S DECISION-MAKING AUTHORITY

Amici characterize OMB's participation in the rulemaking process as constituting a displacement of the Secretary of Labor's authority: e.g., "[I]n fact, it was OMB, and not the Secretary of Labor, that exercised administrative rulemaking authority and ordered the deletion of the STEL from the EtO standard." Amici's Brief, p. 33. However, they do not contend that OMB took any action that was not authorized by the Order. Rather, Amici, following Public Citizen, merely assert that the STEL would have become the Secretary of Labor's final rule but for OMB's participation in the rulemaking process pursuant to the Executive Order's provisions, and they appear to believe that this fact "permit[s] no other conclusion" but that OMB has displaced the Secretary of Labor's authority. Id. This is not a valid inference.

First, it is necessary to emphasize that the Government is not contending that the Executive Order 12291 is innocuous. To the contrary, the President's Order is intended to have consequences -- it is expected that, as appropriate and within the constraints of applicable statutes and judicial decisions, the Order's instruction to the heads of Executive agencies may alter the outcome of agency rulemaking. But the manner in which this is accomplished does not involve the transfer of an agency's rulemaking authority to the President or OMB or anyone else, as the Order itself makes expressly clear: "[N]othing in

this subsection shall be construed as displacing the agencies' responsibilities delegated by law." EO 12291 §3(f)(3).

As we set forth in our principal brief, the President -- through EO 12291 -- has directed all Executive Branch agencies to promulgate regulations in accordance with certain substantive policy requirements "to the extent permitted by law."

EO 12291 §2. For example, when their enabling statutes grant them discretion in the matter, agencies are directed to make their regulations cost-effective: "[a]mong alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen." EO 12291, §2(d). That is, the President has in this Order informed the Executive Branch agencies how he wishes them to exercise their discretion with respect to cost-effectiveness -- they are to choose the least expensive of otherwise equal and legal courses. But in issuing this directive, the President expressly declined to "displac[e] the agencies' responsibilities delegated by law." Id., §3(f)(6). An agency head remains legally free to ignore the Executive Order's directive and exercise his discretion so as to promulgate a regulation which is not cost effective. The legality and binding nature of an agency's action would not be affected by its refusal to adhere to the Executive Order.³

³ The Executive Order "is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or

(CONTINUED)

This is not to say that if agency heads were to take such actions, that their actions would always be without any consequences. The President's power of removal is intended "to insure the President's control and supervision over the Executive Branch." Sierra Club v. Costle, 697 F.2d 298, 405 (D.C. Cir. 1981). And in the face of this removal power, it may be expected that an agency head would not lightly ignore the President's instructions. Thus, consistent with his authority under the Constitution, which vests in the President "[t]he executive Power," and under the OSH Act, the President through this Order supervises and shapes the exercise of discretion by his subordinates in the Executive Branch, without, however, displacing their statutory authority or altering their statutory responsibilities. Constitution, Art. II §1.

The discretion of agencies is thus supervised by the President, and not, as Amici sometimes imply, by OMB. OMB has authority only to review agency regulatory impact analyses and rules for compliance, to the extent permitted by law, with the requirements established by the President. It has no authority

³ (FOOTNOTE CONTINUED)

procedural, enforceable at law by a party against the United States, its agencies, its officers or any person." EO 12291 §5. Cf. In Re Mining Regulation Litigation, 627 F.2d 1346, 1357 (D.C. Cir. 1980); Nat'l Renderers Ass'n v. E.P.A., 541 F.2d 1281, 1291-92 (8th Cir. 1976); Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir.) cert. denied, 424 U.S. 966 (1976); Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451, 456 (D.C. Cir.) cert. denied, 382 U.S. 978 (1966).

to introduce policy requirements of its own into this review: its carefully circumscribed authority is limited to the review of agency submissions, the submission of views on agency rules, and requesting agencies to respond to its views. It must be emphasized that OMB has no authority to require an agency to conform to its views. The President has directed agencies only to respond to OMB's views, not to conform to them.

This is not to say that OMB's role under the Order is ineffectual. OMB -- consistent with its unique role in the government as the President's managerial arm⁴ -- is charged by

⁴ The Office of Management and Budget was established in the Executive Office of the President pursuant to Reorganization Plan 2 of 1970. 31 U.S.C. 501, note. The Office was intended to provide an institutional staff "to assist with management functions for which the President is responsible." Id., §301. The Office's intended functions include the kind of evaluative functions exercised in this case (id.):

The new Office of Management and Budget will place much greater emphasis on the evaluation of program performance: on assessing the extent to which programs are actually achieving their intended results Program evaluation will remain a function of the individual agencies as it is today. However, a single agency cannot fairly be expected to judge overall effectiveness in programs that cross agency lines -- and the difference between agency and Presidential perspectives requires a capacity in the Executive Office to evaluate program performance whenever appropriate. [Emphasis supplied.]

OMB's regulatory review function under EO 12291 parallels other OMB functions in which OMB performs review on behalf of the President as his delegate. For example, for more than fifty years, OMB has reviewed and cleared agencies' proposed testimony and reports to Congress for their consistency with the President's policies and provides management guidance to agencies. See Neustadt, Presidency and Legislation: The Growth (CONTINUED)

the President to review an agency's proposed regulations with an eye to whether they are consistent with the requirements set forth by the President in EO 12291. In light of its resources and experience with similar executive orders under the Ford and Carter administrations, OMB can be expected to provide an independent perspective which may often assist agency heads in conforming their agency's actions to the President's policies.⁵ Often, therefore, OMB may "alter the outcome" of agency rulemaking by pointing out to an agency an inconsistency between one of its provisional rules and the President's directives thus causing the agency to focus more precisely on the issue and providing it with the opportunity to decide to alter its course. This is, as the record demonstrates, what occurred in this case.

⁴ (FOOTNOTE CONTINUED)

Of Central Clearance, XLVIII Amer. Pol. Science Review 641 (1954); see also, Reorganization Plan 2 of 1970, supra.

Moreover, to emphasize the intimate relationship between the President and his Office of Management and Budget, the powers and duties previously granted by statute to the Office's predecessor, the Bureau of the Budget, were transferred to President directly who, in turn, delegated the authority to the Office of Management and Budget by Executive Order. Id. These powers and duties included assisting the President in exercising both his statutorily based functions -- budget preparation pursuant to the Budget and Accounting of 1921 -- and his constitutionally based functions -- legislative review and clearance and executive management.

⁵ As this Court has noted, an "overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policy-makers in other agencies as well as in the White House." Sierra Club v. Costle, supra, 657 F.2d at 406.

OMB, after review of the Secretary's proposed final rule on EtO expressed the view in a letter to the Secretary of Labor dated June 14, 1982 (J.A. 415), that portions of the rule were inconsistent with the President's directives⁶ and it requested Labor to respond to these views.⁷ After reviewing OMB's comments, the Secretary of Labor determined that the quantification of risk avoided by a STEL and the need for a STEL in light of the PEL of the new standard "merit[ed] more deliberate review." 49 Fed. Reg. 36660 (June 22, 1983). The final rule promulgated by the Secretary did not contain a STEL; instead the Secretary engaged in additional rulemaking and sought additional public comment on the need for a STEL. Subsequently, after six months of additional rulemaking, the Secretary's finding that there was a lack of evidence of any dose-rate response for EtO, the Secretary concluded that under the OSH Act "adoption of a STEL for EtO is not warranted by the available health evidence." 50 Fed. Reg. 65. In sum, OMB has done no more than what the Order permits -- it has reviewed Labor's proposed final rule and expressed its views on the

⁶ The particular requirement of the Order which OMB found the STEL to be inconsistent with in this case was the requirement that "Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action." EO 12291, §2(a).

⁷ The President has directed agency heads to defer rulemaking until they have responded to OMB's views. EO 12291 §3. This directive does not apply, however, if to do so would "conflict with deadlines imposed by statute or by judicial order" EO 12291 §8(a)(2).

matter. Neither Amici nor petitioners have alleged that more has occurred.⁸ It is evident that, in such circumstances, it is unreasonable to characterize OMB as having displaced the rulemaking authority of the Secretary of Labor.⁹

Accordingly, the Court need not reach the issue which Amici seek to raise -- whether the President is constitutionally or statutorily authorized to completely displace the decision-making authority of one of his subordinates in the Executive Branch. The Order does not authorize such action; action beyond the scope of the Order has not been alleged; nor does any such

⁸ OMB also expressed its view that other portions of the Secretary's proposed final rule were inconsistent with the President's directives, including the provision which required the PEL to be achieved by engineering methods whenever possible, rather than, for example, face-masks and the like. OMB contended that reliance on engineering techniques was inconsistent with the cost-effectiveness standard of the Order. J.A. 415 ff. Notwithstanding, the Secretary of Labor promulgated his final regulation which required engineering techniques.

This illustrates the point the Government wishes to make -- that the Order permits OMB to influence agency discretion without displacing an agency's authority.

⁹ Even if, as was not the case here, an agency head were to disagree with the President's regulatory principles, the Order could still not be said to "displace his authority." The agency head remains free to risk presidential discipline and take the action he believes appropriate. It can be noted in passing that the exercise of presidential discipline is not itself without checks in our political system. While a President may remove an agency head in the Executive Branch at will, Congress can -- and, in virtually all important areas, has -- made the appointment of the agency head's successor subject to the confirmation of the Senate. The Senate can and does refuse to confirm nominees whom it believes will not give appropriate attention to the duties of their office.

action appear from the face of the record. Thus, the only issue before the Court is whether the Presidential directives contained in, and the OMB activities authorized by, the Order -- which supervise the exercise of agency discretion by agency heads without displacing their rulemaking authority -- are within the President's constitutional and statutory authority.

II

THE PRESIDENT HAS AUTHORITY UNDER THE CONSTITUTION TO ISSUE EXECUTIVE ORDER 12291

In our opening brief, we demonstrated that the President has constitutional authority to supervise the exercise of his subordinates' discretion in the manner accomplished through EO 12291. This authority derives from the President's general authority to "take Care that the Laws be faithfully executed" and his authority to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." Constitution, Art. II, §3, §2. The Government contends that an interpretation of the chief Executive's role that would permit Congress to assign discretionary authority to the President's subordinates in the Executive Branch not subject to his supervision would violate the unity and independence of the Executive power and allow Congress to structure a government with a plural executive power. We relied in this regard upon this Court's decision in Sierra Club v. Costle, supra, 657 F.2d at 405, where the Court held:

The executive power under our Constitution, after all, is not shared -- it rests exclusively with the President. The idea of a "plural executive,"

or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source. To insure the President's control and supervision over the Executive Branch, the Constitution -- and its judicial gloss -- vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy. . . .

The authority of the President to control and supervise executive policymaking is derived from the Constitution. 10/ [Emphasis supplied.]

Amici respond that, under the Constitution, the President "may remove executive officers if he is dissatisfied with their performance, [but] he may not interfere with their execution of their duties." Amici's Brief, p. 52. Amici contend that this proposition finds support in "a long line of legal opinions"; they rely primarily upon Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) and dicta in Myers v. United States, 272 U.S. 52 (1926). See Amici's Brief, pp. 50 - 56.¹¹

¹⁰ See also Straus, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Col. L. Rev. 573 (1984); Shane, Presidential Regulatory Oversight and the Separation of Powers: The Legality of Executive Order No. 12291, 23 Ariz. L. Rev. 1235 (1981); Elliott, INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto, 1983 Supreme Court Review 125; Stewart and Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193 (1982). On April 28, 1985, the constitutional basis of the President's authority to issue EO 12291 was endorsed by the American Bar Association's Section of Administrative Law in its report to the ABA.

¹¹ Amici in this regard do not discuss this Court's judgment in Sierra Club v. Costle, supra.

Amici, however, are incorrect. No court, including the authorities on which they rely, has ever held that the Executive's ability to supervise his subordinates is limited to removing them if dissatisfied with their performance and that he may not supervise and guide the exercise of their discretionary authority.

Kendall v. United States, supra, is in no sense apposite. That case concerned whether the President had any constitutional role to play when the ministerial duties of his subordinates were at issue. The Supreme Court directed the issuance of a mandamus, directing the postmaster general to pay money in accordance with a statute which left him no room for judgment, on the ground that the postmaster's relevant duties "grow out of and are subject to the control of the law, and not to the discretion of the President." Kendall v. United States, supra, 37 U.S. at 610. The Supreme Court therefore did not reach -- and did not intend to reach¹² -- the question of the scope of the President's constitutional authority when the law offers a choice of possible courses of action.

Likewise, the Myers dicta is inapposite. First, Myers makes clear (272 U.S. at 135) that the general rule is that:

Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested

¹² See the full discussion of the case, including arguments made to the Court, in Grundstein, Presidential Power, Administration and Administrative Law, 18 Geo. Wash. L. Rev. 285, 309-19 (1950).

by the official thus empowered [is a] . . . subject[] which the President must consider and supervise in his administrative control.

Under this general rule, the President "may properly supervise and guide their construction of the statutes under which they [agency heads] act." Id. Only in rare cases -- cases in which "duties . . . peculiarly and specifically committed to the discretion of a particular officer" (Id.) -- does the Myers dicta suggest any possible limitation on the authority of the President to "overrule or revise" the officer's interpretation of his statutory duty. Here, of course, there is merely the routine grant of rulemaking authority to a cabinet-level official. There is nothing rare, nothing "peculiar."¹³ Whatever may be the scope or viability of Myers' dicta,¹⁴

¹³ Compare American Federation of Government Employees v. Carmen, 669 F.2d 815, 823 (D.C. Cir. 1981):

[W]e would not conclude that Congress, simply by assigning a function to an executive agency, thereby intended to exclude initiating action by the President. As this court has had recent occasion to observe, "Within the range of choice allowed by statute, the President may direct his subordinates' choices."

¹⁴ The only example in Myers where the Court speculates that the "influence and control" of the Executive may be inappropriate concerns formal, quasi-judicial judgments affecting individuals after a hearing. 272 U.S. at 135. But even the value of this dicta is uncertain. This Court has held that such quasi-judicial activities do not require independence from Executive control, and, in Kalaris v. Donovan, 679 F.2d 376 (D.C. Cir. 1983), the Court held that placement of such a quasi-judicial body within the Department of Labor was an indication of Congressional intent that the Executive was to enjoy such control. EO 12291, of course, does not apply to formal rulemaking or to quasi-judicial activities. EO 12291 §1(a)(1).

the dicta does not purport to apply to rulemaking. And, as we argued in our principal brief, the mere fact that rulemaking requires technical, scientific judgments to be made can not of itself support an inference that Congress intended to "convert informal rulemaking into a rarified technocratic process, unaffected by political considerations." Sierra Club v. Costle, supra, 657 F.2d at 408. See Respondent's Brief, p. 85; Straus, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, supra, 84 Col. L. Rev. at 665-66.

III

THE PROVISIONS OF EXECUTIVE ORDER 12291 ARE CONSISTENT WITH THE OSH ACT

Amici also argue that OMB's participation in the Secretary's rulemaking pursuant to the terms of EO 12291 "violated Congress' clearly expressed mandate that health and safety standards be promulgated by the Secretary of Labor" Amici's Brief, p. 29. It is apparently Amici's contention that the Congress intended the Secretary of Labor to be independent of the President's supervision or influence and to rely solely upon his own "resources and expertise [in] . . . making the proper judgment as to how best to fulfill Congress' objectives in this area." Id. In support of this contention, Amici point only to the language of the statute which makes no provision for Presidential supervision or OMB oversight and to legislative history indicating an expectation that the rules promulgated by

the Secretary of Labor under the OSH Act would likely be "'the result of a studied scientific approach which should characterize rulemaking of this type.'" Amici's Brief, p. 30.

Amici do not directly address the two arguments made by the Government concerning the proper construction to be given to the OSH Act's delegation of rulemaking authority to the Secretary of Labor.

(1) In our principal brief, we pointed out that the Congress vested this discretionary authority in a Cabinet-level official of the Executive Branch, of which the President is the head. Under the Constitution, the President has the unquestioned power to remove the Secretary of Labor at will. Kalaris v. Donovan, 697 F.2d 376, 389 n. 54 (D.C. Cir. 1983). It is intended that this removal power "insure [the President's] control and supervision over the Executive Branch." Sierra Club v. Costle, supra, 697 F.2d at 405. Accordingly, by granting this rulemaking authority to an Executive Branch official, one must conclude that Congress intended that the discretionary authority would be exercised subject to the President's supervision. Congress' silence regarding the relationship between the President and his subordinate in the Executive Branch must be assumed to reflect Congress' acquiescence in the normal and typical relationship between these officials. American Federation of Government Employees v. Carmen, supra, 669 F.2d 815. Cf. Sierra Club v. Costle, supra, 657 F.2d at 406: "In the particular case of EPA, Presidential authority [to control and supervise

rulemaking] is clear since it has never been considered an 'independent agency,' but always part of the Executive Branch." [Emphasis supplied.] Likewise, the Secretary of Labor's discretionary authority in his implementation of the OSH Act is subject to the supervision and control of his superior, the President.

This conclusion is confirmed by the legislative history of the OSH Act. An alternative to the bill enacted by the Congress would have placed the authority for exercising some of the functions of the OSH Act in independent boards or agencies, rather than the Secretary of Labor. But, instead, the Congress gave full power to implement the Act to the Secretary of Labor in order to allow "the Congress and the public to hold him [the Secretary of Labor] accountable for the overall implementation of that program." S. Rep. No. 1282, 91st Cong., 2d Sess., p.8 (1970).¹⁵

¹⁵ Of course, the the only publicly elected -- and therefore publicly accountable -- official in the Executive Branch is the President. Sierra Club v. Costle, supra, 657 F.2d at 405. Thus, the public accountability of the Secretary of Labor must be predicated upon the President's power to supervise the Secretary. This understanding was confirmed by Sen. Javits. Sen. Javits had supported placing some of the OSH Act functions in an independent board, but he acknowledged that "Cabinet-level officials are, it is true, more sensitive to political influences and can be held accountable for the failure of their Departments" Id., p. 57 (individual views of Sen. Javits).

For this reason, amici's reliance on United States v. Accardi, 347 U.S. 260 (1954), is misplaced. The Court in that case was concerned with the Board of Immigration Appeals, which was, under regulations promulgated by the Attorney General,

(CONTINUED)

Amici's reference to Congress' expectation that OSH Act regulations would involve scientific judgments does not point to a different conclusion. As this Court has elsewhere held, without more one cannot conclude "that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power." Sierra Club v. Costle, supra, 657 F.2d at 408. And this is true even if "Presidential prodding may direct an outcome that . . . is different from the outcome that would have obtained in the absence of Presidential involvement." Id.

(2) Moreover, Amici's construction would have the Congress granting to a high-ranking Executive Branch official the authority to take discretionary actions independent of the President's supervision. But it is the President to whom the Constitution grants the Executive Power of the United States and to whom is given the obligation to "take Care that the Laws be faithfully executed." Constitution, Art. II, §3. Thus, Amici's construction of the OSH Act would provoke a constitutional

¹⁵ (FOOTNOTE CONTINUED)

charged to exercise its discretion independently of the Attorney General. United States v. Accardi, supra, 347 U.S. at 266-67. Without the regulation, the Court made clear that the Attorney General would have had power to "sidestep the Board or dictate its decision. . . ." Id. Here, to the contrary, nothing in the OSH Act requires the Secretary to exercise his judgment independently of his superior, the President; to the contrary, under the Executive Order, the Secretary is instructed to exercise his discretion in accordance with the directives of the President.

confrontation and it is established that such constructions are to be avoided when fairly possible.

CONCLUSION

For the foregoing reasons and those set forth in our principal brief, the petitions for review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 1985, I served the foregoing Respondents' Brief In Reply To Brief Of Amici Dingel, et al., upon counsel of record by causing copies to be mailed, postage prepaid, to:

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